

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

WORKERS UNITED,

Petitioner

Case No. 03-RC-294186

-and-

STARBUCKS CORPORATION,

Employer.

**PETITIONER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DENIAL OF
MOTION TO BAR RECEIPT OF EVIDENCE**

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INTRODUCTION

Workers United requests review of the Regional Director's decision to allow Starbucks Corporation to present an identical case on the question of the appropriate unit at the East Robinson Starbucks location in Buffalo, NY.

In making this request, Workers United ("Union") asks that the Board take a step towards stopping Starbucks' endless abuse of the agency's infrastructure. Starbucks has treated the NLRB with contemptuous disregard for over half a year, misusing every process it can in order to gain more time to terrorize its own workforce, as workers attempt to exercise their most basic rights under the Act. Despite numerous procedural attempts by the Union to stop Starbucks from presenting evidence and arguments on which it knows are a sham, no Regional Director has stopped the Company. This has been so even when, in this case, the Company announced its intent to present the same case for a fourth time, while outright refusing to comply with a Regional Director's Order. Pursuant to 29 C.F.R. § 102.67(c), the Union requests special permission to appeal the Regional Director of Region 3's failure to bar evidence introduced by Employer Starbucks Corporation (hereinafter "Company" or "Starbucks") at a pre-election hearing.¹

This case is the fifth one where the Union has filed one or more RC petitions to represent workers at a Starbucks location in the Buffalo, New York area. Starbucks raised the same appropriate unit issue it has raised in dozens of cases across the county, including in Region 3 – an issue on which it and Region 3 knew the Company was absolutely guaranteed to lose. The Union filed a Motion to Bar Receipt of Evidence Pursuant to 29 C.F.R. § 102.66(c) on April 28, 2022, asking that Starbucks not be allowed to present functionally identical evidence about the so-

¹ This request specifically concerns the RD's failure to bar evidence before or at the pre-election hearing, and does *not* challenge the DDE that the RD eventually issued in this case. As such, under no circumstance should the pendency of resolution of this request cause the ballots of workers to be impounded under the Board's Rules and Regulations.

called Buffalo market of Starbucks stores yet again.² The Regional Director (“RD”) issued an Order to Submit Offer of Proof, dated May 2, 2022, ordering Starbucks to submit answers to eight categories of questions. Starbucks submitted an offer of proof that recited identical facts and arguments as it has in every Starbucks RC case at the agency so far, including in a previous case in Region 3, 03-RC-292127 (“Buffalo IV”). Critically, Starbucks refused to even answer at least one category of questions from the RD’s Order – questions in number 5, regarding employee interchange. The Union also made a submission, highlighting numerous instances of the company’s position in this case being identical to the failed arguments from previous cases before the agency.

Moreover, the East Robinson interchange data was already in the record in Case No. 03-RC-292127, held mere weeks prior, making any additional interchange data materially duplicative. Employer Exhibit 701(a) in Case No. 03-RC-292127 contained interchange data for East Robinson (Store #50060) from its opening in early 2021 until April 1, 2022, which showed 214/6,926 shifts (3.12%) were worked by borrowed partners at East Robinson. This rate is much lower than other stores in the area already determined sufficiently autonomous to support individual store units in Buffalo I and Buffalo II.

At the pre-election hearing on May 6, 2022, the Regional Director granted the Motion to Bar Receipt of Evidence regarding testimony from regional and district management and bargaining proposals made by the Union during contract negotiations at other area stores, but allowed Starbucks to present its interchange data. The Regional Director permitted the interchange data despite the Company’s blatant refusal to comply fully with the RD’s Order by answering the questions on employee interchange, and despite the duplicative nature of the evidence already

² Board Exhibit 5.

presented in 03-RC-292127. Unsurprisingly, Employer Exhibit 801(a) in the instant case showed that borrowed partners worked 241/7,493 shifts (3.21%) at East Robinson, effectively identical to the interchange rate that Employer Exhibit 701(a) showed for East Robinson in 03-RC-292127.

The Union requests review of the RD's failure to bar Starbucks from presenting duplicative and useless evidence at the pre-election hearing, despite the Company's transparent intent to present evidence which it knew would fail to carry its burden regarding the appropriate unit question, and despite the Company's outright refusal to make any offer of proof on a critical series of questions in the RD's Order to Submit Offer of Proof, regarding employee interchange.

I. The RD should have barred Starbucks' interchange data because the evidence was already presented in a prior case and because Starbucks refused to comply with her Order to Submit Offer of Proof, pursuant to 29 C.F.R. § 102.66(c).

In her Order to Submit Offer of Proof (hereinafter "Order"), the RD ordered Starbucks to respond with the following information:

5. In *Mesa I*, the Board concluded that that the Employer's analyses of the data in that case did not show how often the petitioned-for employees worked at other locations and how often "borrowed" employees worked at the petitioned-for location. Accordingly, with respect to the issue of interchange, and given the burden to rebut a single store presumption, please provide the following information since April 2019 with respect to baristas and shift supervisors:

- a. The percentage of total hours worked at the East Robinson store by borrowed employees whose assigned home stores are at other stores in the Buffalo market.
- b. The percentage of total shifts worked at the East Robinson store by borrowed employees whose assigned home stores are at other stores in the Buffalo market.
- c. The percentage of total hours worked at other stores in the Buffalo market by borrowed employees whose assigned home store is the East Robinson store.
- d. The percentage of total shifts worked at other stores in the Buffalo market by borrowed employees whose assigned home store is the East Robinson store.

Starbucks refused to answer any aspect of this part of the Order.³

On the hearing day, it became obvious why. The employee interchange data demonstrated that the percentage of total shifts worked at the store by borrowed partners was **3.2%**, much too low a rate to sustain its burden. Employer Exhibit 701(a) from Case No. 03-RC-292127, litigated mere weeks prior, contained materially duplicative evidence that showed the interchange rate would be much too low to sustain the Company's position in the instant case. Employer Exhibit 701(a) contained interchange data for East Robinson (Store #50060) from its opening in early 2021 until April 1, 2022, which showed 214/6,926 shifts (3.12%) were worked by borrowed partners at East Robinson. Employer Exhibit 801(a) in the instant case, which contained an additional five weeks of data, showed that borrowed partners worked 241/7,493 shifts (3.21%) at East Robinson, effectively identical to the interchange rate that Employer Exhibit 701(a) showed for East Robinson in 03-RC-292127. Moreover, even if every shift was worked by a borrowed partner in the five additional weeks of data presented, which would never happen, the evidence on employee interchange from Case No. 03-RC-292127 plus the additional borrowed shifts would still not overcome the presumption.

Under the Board's Rules and Regulations Section 102.66(c), "If the Regional Director determines that the evidence described in an offer of proof is insufficient to sustain the proponent's position, the evidence **shall not be received.**"⁴ Applying this rule to the duplicative evidence and the Company's utter failure to even respond to questions 5.a through 5.d of the Order should have been simple: any evidence described in the Offer of Proof could not sustain the Company's position. Therefore, under Rule 102.66(c), the RD should not have allowed Starbucks to present

³ Board Exhibit 6.

⁴ 29 C.F.R. § 102.66(c) (emphasis added).

interchange evidence here. The RD's intent to allow Starbucks to nevertheless proceed as it always had to a hearing therefore lacked any rational basis.

Based on Starbucks' duplicative evidence presented and disregard for the Order and its bad-faith refusal to answer questions 5.a through 5.d, the RD should have precluded the Company from presenting any evidence at the hearing related to employee interchange.

II. The ever-growing backlog of Starbucks RC matters within the NLRB's system highlights the need for common-sense limits on the Employer's abuse.

At the time the RD made her decision to allow Starbucks to present a meaningless case on an already-decided issue, the backlog of Starbucks RC cases within Region 3 and nationally was sizeable. The problem has only continued to grow, and will worsen as Starbucks workers' campaign accelerates, unless the company is prevented from clogging the system with its virtually infinite resources. When the RD was confronted with Starbucks' representations about the case it would be presenting and the inevitable outcome of the matter, the national picture of Starbucks RC cases included the following facts:

- 34.8 median days, date filed to election start, all petitions FY2021;⁵
- 52 median days, date filed to election start, all Starbucks petitions for which election dates have been set (DDEs + Stipulations) (n=55);
- 49 median days, date filed to election start, Starbucks Stipulations (n=34);
- 80 median days, date filed to election start, Starbucks DDEs (n=21);
- 37 median days, hearing end to Starbucks DDE (n=21);
- 52—number of post-hearing Starbucks petitions awaiting DDE;
- 25 median days, hearing end to DDE, were all awaited post-hearing DDEs;
- 65 median days, date filed to election start, were all awaited post-hearing DDEs;

⁵ NLRB FY2021 Performance and Accountability Report, p.17.

- 100%—percentage of all awaited post-hearing DDEs that, if issued today, would exceed 34.8 day FY2021 median for date filed to election;
- 41—number of awaited post-hearing DDEs that, if issued today, would exceed 52 median days, date filed to election start, all Starbucks petitions.⁶

As the Board is no doubt aware, the situation grows worse, despite the tangible efforts of the Board and other parts of the agency, and even with the existence of the published decision in the *Mesa* case. So far, Starbucks workers have petitioned for a representative at nearly 300 locations. The company has roughly 9,000 corporate-owned stores in the U.S. The movement of Starbucks workers grows and deepens daily. If Starbucks is allowed to continue to force the parties into sham hearings before workers at each store have an opportunity to vote, the situation facing the agency will become untenable soon. In addition, each instance of a pointless hearing means that the workers at the location or locations at issue have been deprived of timely participation in the election process. There is no counterbalancing policy reason to justify this.

⁶ See discussion Petitioner's RSPO, Board Exhibit 4, pp. 6-7.

CONCLUSION

For these reasons, Workers United respectfully requests review of the RD's decision to allow Starbucks to present evidence, including and especially evidence of employee interchange, and requests that the Board reverse the decision of the RD, and issue a finding that Starbucks should have been prevented from presenting this evidence, in addition to any other remedy the Board deems appropriate.

Dated: Buffalo, NY
May 26, 2022

/s/ Ian Hayes
Ian Hayes

/s/ Michael Dolce
Michael Dolce

CERTIFICATE OF SERVICE

I certify that the Union's Request for Special Permission to Appeal was electronically filed on May 26, 2022 through the NLRB E-filing system, and was served via email to the below on the same day:

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